

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mary Walkinshaw,)	
)	No. CV 02-170-TUC-FRZ
Plaintiffs,)	
)	ORDER
v.)	
)	
City of Tucson,)	
)	
Defendants.)	

This action commenced with the filing of the original Complaint on April 1, 2002.

With leave of Court, Plaintiff's First Amended Complaint was filed December 3, 2002, alleging four separate counts of employment discrimination.

Counts One and Two allege employment gender pay discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ; Count Two alleges a violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1); and Count Four alleges retaliation in violation of Title VII.

Before the Court for consideration is Defendant's Motion for Summary Judgment.

This matter was referred to the United States Magistrate Judge for all pretrial proceedings and report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) and LRCiv 72.1 and LRCiv 72.2, Rules of Practice of the United States District Court for the District of Arizona.¹

¹The Rules of Practice of the United States District Court for the District of Arizona, Local Rules of Civil Procedure, were amended effective December 1, 2004. The provisions of former Local

1 Magistrate Judge James C. Carruth issued his Report and Recommendation, filed July 2,
2 2004, which includes a thorough factual and procedural history of this action and provides a
3 legal analysis and discussion of each matter at issue.

4 Magistrate Judge Carruth recommends that the Court, after its independent review, deny
5 Defendant's Motion for Summary Judgment on the Equal Pay Act and Title VII gender
6 discrimination claims and grant Defendant's Motion for Summary Judgment on the Title VII
7 retaliation claim.

8 Plaintiff and Defendant filed separate objections to the Report and Recommendation. No
9 responses were filed thereto.

10 Plaintiff objects to the Magistrate Judge's recommendation on the basis the Magistrate
11 Judge improperly concluded that Plaintiff's retaliation claim is premised on the failure to open
12 or create a new position and that she did not express her opposition to gender based wage
13 discrimination before she filed her first charge of discrimination.

14 Defendant objects to the Magistrate Judge's recommendation on the basis that the evidence
15 that the Magistrate Judge considered in making his determination that there were issues of
16 material questions of fact was vague and insubstantial and without foundation, and thus
17 inadmissible in court.

18 After carefully considering the Report and Recommendation, all filings, including the
19 objections filed by the Plaintiff and the Defendant, the Court shall adopt in part, and reject in
20 part, the Report and Recommendation of the Magistrate Judge. The Court finds that Plaintiff
21 has "set forth specific facts showing that there is a genuine issue for trial," to substantiate all
22 claims as alleged in the First Amended Complaint. *Porter v. California Dept. of Corrections*,
23 419 F.3d 885, 891 (2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106
24 S.Ct. 2505 (1986).

25 As explained by the Ninth Circuit in an employment discrimination action:

26
27 _____
28 Rules 1.16 and 1.17 can be found at LRCiv 72.1 and LRCiv 72.2, as amended.

At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents. *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir.2001)("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56."); *Fed. Deposit Ins. Corp. v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir.1991)("the nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.")(internal quotation marks and citation omitted).

Fraser v. Goodale, 342 F.3d 1032, 1036-377 (9th Cir.2003), *cert. denied sub nom.* U.S. Bancorp v. Fraser, --- U.S. ----, 124 S.Ct. 1663, 158 L.Ed.2d 358 (2004); *see also Hughes v. United States*, 953 F.2d 531, 543 (9th Cir.1992); *Fonseca Sysco Food Services of Arizona, Inc.*, 374 F.3d 840, 846 (9th Cir. 2004).

Under the standards set forth by the Ninth Circuit in reviewing a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, and the substantive areas of law at issue, the Court finds it inappropriate to grant judgment as a matter of law on the matters presented at this time.

Based on the foregoing,

The Court, having made an independent review of the record herein, orders as follows:

IT IS ORDERED that Magistrate Judge Carruth's Report and Recommendation [Doc. # 160] is hereby **ACCEPTED** in part and **ADOPTED** in part as the findings of fact and conclusions of law by this Court as to Counts One, Two and Three of the First Amended Complaint;

IT IS FURTHER ORDERED that the Magistrate Judge's Report and Recommendation is rejected as the findings of fact and conclusions of law as to Count Four of the First Amended Complaint;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment [Doc. # 136] is **DENIED**;

IT IS FURTHER ORDERED that the Parties shall file a proposed Joint Pretrial Order on or before June 30, 2006;

IT IS FURTHER ORDERED that this matter is set for **Pretrial Conference, Monday, July 17, 2006, at 2:00 p.m.**;

